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Superior Region CONDO NEWS

Message to Condo Owners.

As you know, Ontario’s Condominium Act, 1998 (the “Act”) protects buyers and owners of condominiums in this province and enhances consumer confidence in the province’s marketplace.

The Ontario Government wants to learn from condominium owners across the province about their experiences with condo buying and living. An online survey, posted at www.ontario.ca/condos asks condo owners about the experiences they’ve had with condo buying, as well as with their condo corporations, boards of directors, repairs and maintenance, reserve funds and dispute resolution. The survey also provides condo owners with information about their rights and responsibilities.

Your local chapter encourages all condominium owners to respond to this survey.

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**Interesting items
 in this issue.**

 The Law
 on
 Common Elements

 How to
 Pay for Retrofits

**Fall 2010
 NOTICE of MEETING
 TO ALL OWNERS**

**CANADIAN CONDOMINIUM INSTITUTE
 Northwestern Ontario Chapter**

The Annual General Meeting of CCI Northwestern Ontario Chapter will be held

**Saturday October 30, 2010
 at 9:00 a.m. sharp**

in the Mural Room of the Masonic Temple
 1600 Dease Street, Thunder Bay, Ontario.

In accordance with Section 3.02 of By-law 1 (one) which states that any member who wishes to run for a Board position can do so by advising the office of the local Chapter in writing of their intent to do so no later than **12 noon Wednesday, October 27, 2010.**

This year there are **two (2)** positions up for election (three (3) year term) to the Board of Directors.

Sharon Hagstrom, of AON Reed Stenhouse Inc.
J. Douglas Sharks, of Cheadles LLP
 have consented to let their name stand for office.

NEXT SEMINAR Saturday October 30, 2010

9:00 am sharp

Masonic Temple 1600 Dease Street

Registration form on back page

Condominium Common Elements

Additions, Alterations and Improvements

Ontario condominium corporations are now left in uncertainty over their power to restrict changes made to common elements of individual units. The purpose of section 98 of the Condominium Act, 1998 is to prohibit unit owners from making changes to the common elements of their condos unless they receive permission from the Board of Directors. Condominium corporations have no obligation to give consent to unit owners to make changes to the common elements. Section 98 states that "an owner may make an addition, alteration or improvement to the common elements" if the Board provides approval. This provision should, in theory, give the Board complete control over changes made to the common elements of condominium units. The uncertainty derives from the question of what constitutes an addition, alteration or improvement. The ambiguity in the answer shifts the balance of decision making power slightly away from the Board and closer to the individual unit owners.

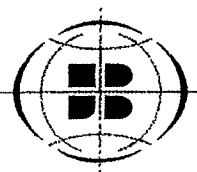
Changes Defined

On November 9, 2009, when faced with the question of whether or not a hot tub qualifies as an addition, alteration or improvement, the Ontario Court of Appeal affirmed definitions to these three terms in the case of *Wentworth Condominium Corp. No. 198 v. McMahon*. Condominium unit owner, McMahon, placed a hot tub on his common element yard appurtenant to his unit without permission or approval from the Board. The Board made an application seeking removal of the hot tub on the basis that it was a change to the common elements. The Superior Court determined, after considering section 98, that the hot tub was not an addition, alteration or improvement to

the common elements. To clarify this point, the Court stated that an "addition" is something that is joined or connected to a structure, an "alteration" is something that changes the structure, and an "improvement" is the betterment of the property or enhancement of the value of the property. Since the hot tub is not connected to the property and it does not directly change the structure of the property it cannot be deemed an addition or alteration, respectively. Furthermore, the hot tub does not improve the property or enhance its value as it can easily be removed by McMahon if he so chooses. Therefore, according to the Superior Court, the hot tub did not qualify as something that requires approval by the Board and McMahon was able to keep the hot tub. The Court of Appeal affirmed this decision and further stated that the definitions "provide a valuable starting point" for decisions relating to section 98 of the Act.

Application of McMahon

If the McMahon reasoning is the starting point for these types of cases, all future changes to condominiums should follow precedent. The case of *Metropolitan Toronto Condominium Corp. No. 985 v. Vanduzer* was decided a mere three months after McMahon on February 9, 2010 with a different result. This case had a similar fact pattern whereby the unit owner, Vanduzer, had a gazebo erected on her common element terrace appurtenant to her unit against the permission of the Board. Vanduzer argued that since the gazebo was not attached to the terrace, it should not be considered an addition to the common elements, which by the definitions affirmed in McMahon would be an accurate statement. Instead, the Court concluded that the gazebo was an addition and ordered Vanduzer to remove the



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gazebo from the common elements of her unit. Why was Vanduzer's gazebo considered an addition to the common elements while McMahon's hot tub was not?

Distinguishing McMahon and Vanduzer

The hot tub in McMahon was a free-standing six feet wide, seven feet long self contained unit. It was not attached to the common elements in any structural way. Its only connection to the unit is the cord that provided it with electricity. Vanduzer's gazebo, on the other hand, although not actually attached to the unit was considered an addition. The difference was in the installation. Vanduzer had the gazebo installed incorrectly. The manufacturer's intended installation of the gazebo clearly stated that, for structural reasons, it must be attached to the ground. The Court concluded that if Vanduzer had correctly installed the gazebo, it would have fallen under the definition of an addition and would therefore be considered a change which would require Board approval.

Other Considerations

The Court also considered that the condominium corporation has a statutory duty, under section 26 of the Act, to manage the common elements of the building. With this duty comes liability for the safety and protection of other unit owners and guests. The hot tub, installed correctly, posed no danger to other people; while the incorrectly installed gazebo, arguably, could pose a threat to other residents.

Lessons Learned

There are some lessons to be taken from these two cases. By definition, an individual condominium unit holder has no right to make changes to the common elements of their unit. They have, however, gained more flexibility in what is a restricted change.

McMahon may have opened a loophole for unit holders to rely on to evade the restrictions stated in section 98 of the Act. As long as the change does not fall within the definitions of addition, alteration or improvement, the unit owner is able to do as he or she pleases. Additions such as barbeques, picnic tables, or even small inflatable pools should be permitted. Some may argue that Vanduzer closed this loophole; but, the Court in Vanduzer actually used the definitions in the way they were intended. The gazebo should have been attached to the ground. If it were, it would have been an addition. Incorrect installation of an object will not fool the Court into allowing prohibited changes. The power of the condominium corporation to restrict changes to common elements may have been slightly narrowed, but the power of the courts to ensure proper application of the law is as strong as ever.

Submitted by J. Douglas Shanks & Rosa Carlino of Cheadles LLP.

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- Change or clean your filter frequently (i.e. every one to two months) during the heating and air-conditioning seasons. A dirty air filter reduces the airflow to the operating equipment and forces it to run longer to heat and cool the house. Using a furnace filter alarm can let you know when the filter needs to be changed. Electronic air cleaner filters also need to be cleaned regularly (every one to two months).

- Keep return air grills, hot air registers, radiators, and space heaters/baseboards clear of furniture, rugs, and drapes to allow free movement of air.
- You can ensure more heated or cooled air reaches its destination by sealing the seams of accessible furnace ducting with aluminum foil tape.

TIP: Aluminum foil tape outperforms duct tape for this job, as duct tape has a tendency to dry out.

- Insulate all ducts in unheated or cooler spaces with commercial duct insulation - or make your own! Simply wrap the ducts with glass fibre batts, secure lightly with string, cover insulation with plastic, and tape all edges. You'll be glad to know that making your home more energy efficient doesn't have to cost a lot of money. There are many easy ways to keep your heating costs down.



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How To Pay for Retrofits

By David M. Morrison, BA, LLB

They say that death and taxes are inevitable. Another certainty is that all condominium properties will eventually require major repairs to, or replacement of, their common elements. How does the condominium corporation, whose constituency is constantly changing as people buy and sell units, prepare for this expense? What are the options when there is not enough money available?

The Limits and Imperfections of the Reserve Fund


The people responsible for the legislation that is the foundation for condominium as a mode of real estate ownership in Ontario have understood that this was an issue from the start, although it has probably never been taken seriously enough. The law has always required corporations to maintain a reserve fund, to be used solely for major repairs and replacement of the common elements. A portion of the monthly common expense fees are contributed to the reserve fund. The directors of each corporation are charged with the responsibility of determining how much is required from time to time. Subject to historic statutory minimums of, originally, five percent of the corporation's operating budget, and later, ten percent, the amount has to be "reasonable". To determine what is reasonable, it was expected that the directors would retain experts to prepare professional reserve fund studies, and historically many did so, but many did not. Now the requirement for a reserve fund study, updated on a periodic basis, is mandatory, although the legislation does not address what happens where a corporation fails to comply, either by not having a study done, by not updating it periodically, or by not soliciting the amount of contributions recommended therein.

The directors do not require the approval of the unit-owners to complete and pay for major repairs to, or replacement of, the common elements out of the reserve fund. Indeed, they are obliged to undertake such projects when necessary, and that is the purpose of the fund. When a proposed retrofit goes beyond repair or replacement, however, and is considered an addition, alteration or improvement to the property, the reserve fund is not available, and the

directors must obtain the approval of the unit owners in accordance with the Condominium Act before undertaking the project. Where there is any doubt, the corporations' counsel is the best person to advise whether a project under consideration falls into this category. Counsel is also the best person to advise on the procedure for obtaining the unit-owners approval where necessary.

Many condominium corporations have encountered the situation where, because a proposed project would constitute an addition, alteration or improvement to the common elements, the reserve fund is not legally available. An even more common situation is where the reserve fund is legally available (for a repair or replacement) but there is simply not enough money saved. This can occur because the fiscal planning process has failed. After all, it is not an exact science, and it is extremely susceptible to

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**To access the survey, go to:
CCI website at www.cci.ca/Survey**

We thank you in advance for your input!

Continued from page 5

political influence from unit-owners who wish to keep the monthly contributions as low as possible. A shortfall can also occur because the expense relates to a latent defect in the construction of the building that was unknown and could not have been anticipated until it declared itself in some way. Sometimes there may be enough money in the reserve fund, but the use of all or a substantial portion of it for the particular project would leave the fund short for future needs. In all of these situations, corporations have had to consider how to pay for the necessary work.

The Typical Thought Process

Condominium corporations encountering these types of situations invariably go through the same thought process. The first inclination is to delay the work until sufficient funds to pay for it can be accumulated. If this is an option, fine. But, more often than not, it is the type of thinking that got the corporation into the predicament in the first place. Buildings tend to do better with constant maintenance

to the infrastructure. Postpone work for too long and problems tend to become deeper and the associated costs of repair larger. Along with that, it becomes much more difficult to project fiscal needs since, in the extreme case, the corporation will be operating in emergency mode.

Closely allied to delaying the project is staging it out. In other words, do part of the work now, part later, spreading it over, say, three years. Again, if this is an option, fine. The problem, however, is that if you are asking the contractor to mobilize three times, as opposed to once, the cost will invariably go up. In addition, the unit-owners may have to confront the idea of living in a construction zone for three years. Generally speaking, it is cheaper, and everyone is happier, when the contractor is able to get in and get out, completing the work as quickly and efficiently as possible.

For this discussion, then, we will assume that any further postponement, or staging, of the work is simply not an option. Otherwise, we assume away the problem.



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Another option, again part of virtually every corporation's thought process when dealing with this sort of issue, is to levy what is commonly known as a "special assessment". Think of it as sending a bill to each and every unit-owner for his or her proportionate share of the cost. A virtual swear word in the industry, for obvious reasons, the term "special assessment" is in fact nowhere used or defined in the Condominium Act. It is clear, however, that the board of directors has the authority, where deemed necessary, to impose one. Sometimes the blow can be softened by spreading the requirement-to-pay over several months.

While certainly no way to win friends and influence people, a special assessment constitutes a quick and efficient way for the corporation and the unit-owners to address a large unplanned cost and get it behind them. In many cases, it will be determined to be the best option. But consider this: what if a large number of unit-owners simply cannot afford the assessment. So, rather than default, they put their units

up for sale. Or, alternatively, they default in payment, and the corporation is forced to lien the subject units and, again, they end up for sale. The law of supply and demand dictates that, if too many units are for sale at one time, the price drops. This in turn, hurts all of the unit owners, including those who can afford to honour their share of the special assessment. Generally, therefore, it is in everyone's best interest for the board to seek out a solution that accommodates the largest number of unit owners. It is at this point that, in many cases, consideration will be given to what is usually, and probably, the last resort - borrowing.

Borrowing

There is nothing in the Condominium Act that prohibits borrowing by a condominium corporation, and indeed, there are hundreds of corporations that have had to resort to this option in order to deal with a large unplanned expense. Notwithstanding that condominium corporations should, because of their assessment powers, be regarded generally as good credits, the major banks in Canada, with limited exceptions, have not really warmed to the idea of lending to them. Where banks have shown some willingness to lend, conditions are often imposed that can be difficult for a condominium corporation to meet. There are logical reasons for this, but an explanation of them is beyond the scope of the article. Suffice to say that lending to condominium corporations in Canada has thus far been dominated by niche finance companies that have created specific products for this purpose.

In order to borrow, the corporation must have passed an appropriate borrowing bylaw. If such a bylaw is not already in place, the corporation's counsel can advise on the procedure for implementing one. After that, if you are dealing with a lender experienced in the area, the process is quite simple. The lender is likely to ask a few general questions, such as how much is required and for what is the money being used; how many units comprise the condominium and what is the average value of a unit; how quickly does the corporation wish to repay the loan. Generally, however, credit approval will come relatively quickly and easily, with the loan being refused in only rare situations.

At the time of making the loan request, the corporation will have to give some thought to how quickly

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Continued from page 7

it wishes to repay the loan, otherwise known as the amortization period. Repayment over five years will obviously require much larger monthly payments than repayment over ten years or more, but of course in the latter case the payments will go on much longer resulting in more interest costs. In most situations, the corporation will opt for an amortization period that results in a monthly payment that the widest group of unit-owners can afford, but without dragging the loan obligation on longer than is reasonably necessary. It is possible, albeit not necessarily advisable or encouraged, to have two or more loans going, each amortizing over different terms. Unit-owners can then elect to participate in the loan that best suits their level of monthly affordability.

The documentation for a loan to a condominium corporation will be comprised of little more than a Loan Agreement and what is known as a General Security Agreement. The latter grants a charge over the corporation's assets in support of repayment of the loan. Since most condominium corporations do not have any assets, what is really being charged is the corporation's cash flow, represented by the monthly contributions of the unit-owners. This makes sense because, in the end, what the lender is relying on primarily is the power and the obligation of the corporation to require each unit-owner to pay his or her proportionate share of all common expenses, including the loan payment, and to enforce payment, using its super-priority lien rights in the event of any unit-owner defaults.

The act of borrowing by a condominium corporation is an act of the corporation, not the unit-owners. Thus, the documents will be executed by those who are empowered from time to time to execute documents on behalf of the corporation, and the lender will invariably require a written opinion from the corporation's counsel that everything has been properly authorized and approved. The unit-owners are not required to sign the documents or guarantee the loan individually, and no mortgage is registered against anyone's unit. Just as in the case of all other common expenses, however, each unit-owner will through the corporation, be responsible for his or her proportionate share of the loan obligation.

Borrowing should never be regarded as a substitute for prudent fiscal planning. It can, however be a solution when there is no other workable answer to a large unplanned expenditure.

David M. Morrison is a non-practicing lawyer and president of Morrison Financial Services Limited, a company which, through its Condo Corp Term Financing product, has for over 15 years been providing financing to corporations to assist them in meeting unplanned major expenditures. The content of this article is intended as general business and legal advice only. For specific situations, readers are encouraged to consult with their own counsel.

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Remember the old days when social networking meant actual face time with people? Whether at a trade show, in the elevator, or at a business lunch, networking happened in a much different way. Even with all the online social networking that is available, it is still essential to know how to network face-to-face.

Here are a few reminders about how you can network effectively:

- Be confident, but not pompous or arrogant. You are just as important as the person you are meeting, but you are not the star of the show.
- Get to know the person you are talking to, and save your agenda until you know the person better.

- If you are with someone, be sure to introduce them as well. The more interaction, the merrier.
- Don't be afraid to share something you are passionate about. You may strike common ground and create a lasting impression.

If you have an idea to share, make it brief. A drop in the bucket is better than a whole bucketful.

An invitation to coffee or a drink is more inviting than a meal. If there is more to chat about, the conversation can continue over dinner.

Don't fake it. Just be you. Lasting business relationships must be grounded in the truth.

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